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In The Supreme Court of The United States

OCTOBER TERM, 1965

T. KIMBALL HILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
DISTRICT DIRECTOR OF INTERNAL REVENUE,
INTELLIGENCE DIVISION,
SAN DIEGO COUNTY OFFICE,
LLOYD TUCKER, CHIEF INTELLIGENCE DIVISION,
CORWIN B. DeVOTIE, and EDWIN H. WORDELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

T, KIMBALL HILL, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit

rendered in the above entitled case on May 6, 1965.

CITATIONS TO OPINIONS BELOW

There was no separate opinion rendered by the District Judge in his denial of plaintiff's motion below. However, the District Judge's findings of fact and conclusions of law are contained in Volume I of the transcript of record and his comments in denying petitioner's motion are contained in Volume II of the transcript at pp. 83-88. The opinion of the Ninth Circuit Court of Appeals dismissing petitioner's appeal is printed at page 37 of Appendix A; the opinion of the Ninth Circuit is reported at 346 F.2d 175 (9th Cir. 1965).

JURISDICTION OF THE COURT

The judgment of the United States Court of Appeals was rendered on May 6, 1965. Rehearing was denied on June 29, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a District Court's denial of a motion to suppress and return records and other data is a final, appealable judgment when the motion has been made, argued and ruled upon prior to, and in the absence of criminal proceedings being instituted against the petitioner.

Should this Court determine that an order such as

the above is a final, appealable judgment, petitioner respectfully prays that the Court then consider the following issue:

2. Whether the obtaining of information, including records, from an individual taxpayer by Internal Revenue agents constitutes a deprivation of the taxpayer's rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution when at no time prior to obtaining such records and information was the taxpayer advised of his constitutional rights or notified that the investigation had changed in nature from civil to criminal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States of America (U.S.C. Vol. 1 page XLVI, 1964 ed.):

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated. ..."

Fifth Amendment to the Constitution of the United States of America (U.S.C. Vol. 1 page XLVI, 1964 ed.):

> "No person shall be ... compelled in any criminal case to be a witness against himself. ..."

Sixth Amendment to the Constitution of the United States of America (U.S.C. Vol. 1 page XLVI, 1964 ed.):

"In all criminal prosecutions the accused shall ... have the assistance of counsel for his defense."

Rule 41(e), Federal Rules of Criminal Procedure (18 U.S.C., Appendix, 1964 ed., Vol. 4, page 3764):

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. ..."

28 U.S.C. section 1346(a) (1958 ed., Vol. 6, page 5025):

"The district court shall have original jurisdiction, concurrent with the Court of Claims, of ...

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress..."

28 U.S.C. section 1291 (1958 ed., Vol. 6, page 5015):

"The courts of appeals shall have jurisdiction of appeals from all final decisions of district courts of the United States. ..."

STATEMENT OF THE CASE AND JURISDICTION OF THE LOWER COURTS

This action stems from the dismissal, on the ground of non-appealability of petitioner's appeal in an action involving the seizure of petitioner's books and records by agents of the Internal Revenue Service. It was petitioner's contention before the District Court, as it is now, that the taking of petitioner's books and records in the course of a criminal tax investigation without at any time warning the petitioner of his rights, constitutes unlawful action in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution. The factual background of this case may be briefly stated as follows:

The petitioner is Dr. T. Kimball Hill, a dentist and oral surgeon practicing in San Diego, California. (Tr. Vol. II p. 11) and the respondents are the United States of America and its agents. (Tr. Vol. II, pp. 45, 68).

In June of 1963, Dr. Hill was contacted by Mr. De Votie, a general agent of the Internal Revenue Service who was in charge of checking Dr. Hill's 1961 income tax return. (Tr. Vol. II, p. 71). In the course of his investigation, the general agent visited Dr. Hill's office on some 20 occasions and then in January of 1964 brought with him for the first time a special agent of the Internal Revenue Service -- Agent Edwin Wordell. (Tr. Vol. II, p. 19). Mr. Wordell was called in after Mr. DeVotie reported to his superiors that there was a possibility of fraud in the case. (Tr. Vol. II, p. 76). This report of possible fraud was made in November of 1963, and Mr. Wordell was assigned to the case on January 8, 1964. (Tr. Vol. II, p. 57). Thereafter, Special

Agent Wordell visited Dr. Hill on a number of occasions and obtained records and other data for use against the petitioner. (Tr. Vol. II, p. 49). It appears that agent Wordell identified himself by showing Dr. Hill an identification card of some sort, (Tr. Vol. II, p. 46) and the District Judge found additionally that Mr. Wordell was introduced by his title of Special Agent. (Tr. Vol. I, p. 48).

It is admitted, however, that at no time in the course of these visits to Dr. Hill's office did either agent DeVotie or agent Wordell inform Dr. Hill of his constitutional rights or warn him of the fact that he was the subject of a criminal investigation. (Tr. Vol. II pp. 48, 59, 65, 66). In February of 1964, having obtained access to the bulk of Dr. Hill's records, the Internal Revenue Service set up a formal interview at their offices, and only then warned Dr. Hill of his right to counsel and of his privilege against self-incrimination. (Id).

Dr. Hill obtained counsel for the first time on March 12, 1964, (Tr. Vol. I, p. 12), and at that time he was made aware for the first time of the functions of a general revenue agent as opposed to the criminal Special Agent. (Tr. Vol. II, p. 44). Dr. Hill then declined to turn over any additional records to the Internal Revenue Service, (Tr. Vol. II, pp. 66-67) and shortly thereafter moved the District Court under the authority of Rule 41(e), Federal Rules of Criminal Procedure (18 U.S.C.) to order the return of the records and copies thereof taken by the agents and the suppression as evidence of any information obtained therefrom. A hearing was held on the motion on April 23, 1964, and on June 24, 1964, an order was entered by the United States District Court for the Southern District of

California, Southern Division, denying Dr. Hill's application for relief and finding that the records in question were not illegally seized. Jurisdiction of the District Court rests in Rule 41(e) of the Federal Rules of Criminal Procedure and alternatively in 28 U.S.C. section 1346(a)(2).

An appeal was then lodged with the United States Court of Appeals for the Ninth Circuit with that court's jurisdiction grounded in 28 U.S.C. § 1291. The appeal was argued before the Honorable Stanley N. Barnes, Ben C. Duniway and Walter Ely and on May 6, 1965, an opinion was rendered by that court dismissing petitioner's appeal on the ground that the order appealed from was not an appealable judgment and did not invoke the court's appellate jurisdiction under 28 U.S.C. § 1291. A petition for rehearing was denined on June 29, 1965.

Because of the important legal and constitutional issues involved, both procedurally and on the merits, petitioner respectfully prays that this Court grant a writ of certiorari and determine finally the questions presented herein.

REASONS FOR GRANTING THE WRIT

1. Appealability of Orders

The problem of whether denial of a motion to suppress evidence is an independent appealable order has, in recent years, been the subject of a good deal of judicial comment; but unfortunately for all that has been written on the subject, there remains a considerable

doubt as to the applicable law. On the one hand, this Court has observed in DiBella v. United States, 369 U.S. 121 (1962) that:

> "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of nisi prius proceedings await their termination by final judgment. This insistence of finality and prohibition of piecemeal review discourages undue litigousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases."
>
> 369 U.S. 121, 124 (1962)

Yet, on the other hand, it has also been recognized that:

> "It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U. S. C. § 1291 without regard to the limitations 18 U. S. C. § 3731. ..." Carroll v. United States, 354 U. S. 394, 402 (1957)

As a result of these conflicting principles the history of this area has constantly been one of a search for guidelines. This high court, as early as 1918 (Perlman v. United States, 247 U. S. 7 (1918)) and 1929 (Cogen v. United States, 278 U. S. 221 (1929)) endeavored to

provide standards only to find that, in light of changing circumstances, it was necessary to again consider the subject in 1956 (Carroll v. United States, 354 U. S. 394 (1956)) and once again in 1962 (DiBella v. United States, 369 U. S. 121 (1962)). This is wholly apart from the decisions of numerous lower courts which have ruled in the area, (e.g. In re Brenner, 6 F. 2d 425 (2nd Cir. 1925), United States v. Ponder, 238 F. 2d 825 (4th Cir. 1956)) often arriving at different results on similar facts.

Briefly analyzing the factual situations involved in these cases, we find that Perlman was a situation involving certain exhibits belonging to the petitioner which were in the custody of the United States District Court pursuant to a civil suit between a corporation which Perlman headed and a rival company. Perlman's corporation asked leave to discontinue its suit without prejudice and the motion was granted on the condition that the exhibits remain in the custody of the court for the use of the United States, the intent being that the data would be presented to a grand jury as part of a criminal action against Perlman. Perlman moved to enjoin the United States Attorney from taking possession of the exhibits and the motion was denied. Perlman appealed to this Court which held the motion to be appealable saying:

> "His (Perlman's) petition was in effect independent and did not lose its character by being entitled in an equity suit." 247 U.S. 7, 12.

In In re Brenner, 6 F.2d 425 (2nd Cir. 1925), cited

with approval by DiBella v. United States, 369 U.S. 121, 132 (1962), the petitioner's liquor supply had been seized under the Prohibition Act and petitioner was charged with violation of the Act. He was convicted under one of two indictments but the conviction was subsequently reversed. The remaining indictment was dismissed and petitioner moved the court for the return of his liquor. The motion was denied and petitioner applied for review to the Second Circuit Court of Appeals which on writ of error treated the motion as reviewable, and reversed the District Court, ordering the return of petitioner's liquor.

Finally, there is United States v. Ponder, 238 F.2d 825 (4th Cir. 1954) which is cited by this Court in Carroll v. United States, 354 U.S. 394, 406 (1957). This was an election fraud case which began with a court order impounding various election records. Defendants were election officials who were indicted for violation of the voting laws. Subsequent to the indictment the defendants moved to suppress the use of the election records as evidence and for their return. The motion was granted by the District Court and the United States appealed. In holding the decision to be an independently appealable order the Fourth Circuit stated:

> "We are of the opinion that the seizure, impounding, return and suppression of the election records constituted a proceeding independent of the criminal case. ... From December, 1954 until the following September, when the grand jury inquiry was commenced, there was no other proceeding touching the election papers. ... The incidence upon the criminal prosecution of the final order in the separate proceeding did

not destroy the independence of the latter." 238 F.2d 825, 827.

Contrasted to these cases are those holding suppression orders to be non-appealable. In Cogen v. United States, 278 U.S. 221 (1928), certain papers were seized from the petitioner. After indictment, but before trial, petitioner moved for the return and suppression of these documents. Relief was denied and petitioner appealed to the Court of Appeals for the Second Circuit which dismissed his appeal on the ground of the denial being a non-appealable interlocutory order. On writ of certiorari this Court affirmed, holding that the motion had been made in the context of a criminal proceeding and was not properly severable from it.

In Carroll v. United States, 354 U.S. 394 (1956), the situation was similar to Cogen except that it was the government attempting to appeal from the granting of a motion to dismiss in a gambling prosecution. This Court held that just as a post indictment motion to suppress, if denied, is not appealable by the petition, so too the granting of such a motion is not appealable on the part of the government.

The latest pronouncement of this Court in the area of appealability is DiBella v. United States, 369 U.S. 121 (1962), a narcotics case, in which the motion to suppress was made prior to indictment, but after arrest and arraignment. The holding there was that:

> "When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment,

> information or indictment -- in each such case the order on a suppression motion must be treated as 'but a step in the criminal case preliminary to the trial thereof.'" 369 U.S. 121, 131.

Yet, notwithstanding this statement, DiBella went on to reaffirm the rule stated by Cogen and Carroll, that a motion which is not intimately connected to a criminal proceeding in esse, can still be the subject of an independent appealable order.

Looking at the overall picture, there is little doubt that the underlying philosophy behind all the cases is to promote the expeditious resolution of criminal matters and in so doing to "discourage the leaden-footed administration of justice." Hence, in keeping with this philosophy, a motion is rightly considered to be interlocutory and non-appealable to the extent that it is an intregal part of a going criminal prosecution. e.g., Cogen, Carroll and DiBella. However, what seems equally to follow from the cases, but what the court below refused to recognize, is the converse principle; i.e., to the extent that a motion is entirely independent of a going criminal proceeding and totally removed from it, it should be considered independent and appealable.

This is the precise situation involved in the present case and the many Internal Revenue cases it typifies. In a very real sense these cases are unique in that on the one hand the person being investigated has not been indicted, arraigned or even arrested. Hence, in no conventional fashion can it be said that a criminal proceeding is in being against him. Yet, on the other hand

it is equally certain that if a criminal prosecution should ever be brought in the future, the records sought by the movant will be a prime source of evidence against him.[1]

No previous decisions of this Court have dealt with this anomalous yet not at all uncommon situation, and it is petitioner's belief that none of the previous decisions provided adequate guidelines for this type of case.

Every previous decision of this Court has arisen in the context of a definitely existing criminal prosecution. In Cogen and Carroll the accused was indicted at the time of the motion and in DiBella he was under arrest and then indicted shortly after the motion for return was made. In each of these cases, allowing an immediate appeal would have had the effect of truncating and delaying a pending criminal prosecution. None of them involved, nor did they purport to involve, a situation where no criminal process of any kind had been invoked against the movant and in which an appeal could be taken and concluded without in any way disturbing the orderly workings of criminal justice.

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[1] Since these cases partake of both criminal and civil aspects it is not surprising that courts have procedurally applied a mixture of criminal and civil rules. Thus, on the one hand Rule 41(e) of the Federal Rules of Criminal Procedure has been held applicable even though the motion to suppress is made well before the institution of formal criminal proceedings. United States v. Cohen, 231 F. Supp. 171 (S.D. N.Y. 1964); and, even applicable in cases where the proceedings are basically civil in nature. Hinchcliff v. Clarke, 230 F. Supp. 91 (N.D. Ohio 1963). On the other hand, civil rules have generally been applied to most other aspects of the suppression motion. Lord v. Kelly, 223 F. Supp. 684, 688 (D. Mass.) appeal dismissed 334 F.2d 742 (1st Cir. 1964).

The fact that this type of case does not interfere with administration of the criminal law is evident from the finding of the Ninth Circuit, that:

> "Admittedly, this motion does not involve a dilatory tactic which interferes with the expeditious resolution of a pending criminal matter; and in that respect it is not objectionable to entertain this appeal." (Appendix A, p. 41)

In light of the above finding it is petitioner's position that the Ninth Circuit both misapplied the law and demonstrated grave misunderstanding of this Court's decision in DiBella v. United States.

It is petitioner's belief that the intent of this tribunal in DiBella v. United States is summarized in, and limited to, the following holding:

> "When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information or indictment -- in each such case the order on a suppression motion must be treated as but a step in the criminal case preliminary to the trial thereof." 369 U.S. 121, 131.

The Ninth Circuit, to the contrary, considers as controlling the broader statement of the Court that:

> "Only if the motion is solely for the return of property and is in no way tied to a criminal proceeding in esse against the movant

> can the proceedings be regarded as independent."

Since the present case involves a motion for both return and suppression, admittedly made prior to detention, arrest or arraignment, it is obvious that a different result will follow depending on which statement in DiBella is deemed to be controlling.

In the present case, the Ninth Circuit adopted as controlling the latter holding requiring that the motion be solely one for return. Other courts, however, have not been so certain as to the meaning and applicability of DiBella. For instance, in Lord v. Kelley, 334 F. 2d 742 (1st Cir. 1964), the First Circuit was presented with a situation not unlike the present case. There, the District Court granted the taxpayer's motion to suppress illegally seized records but the taxpayer appealed when the District Court refused to permanently enjoin the government from retaking the records by other means.

Although the Court could conceivably have held the appeal to be interlocutory on the authority of DiBella, the Court instead went out of its way to dismiss the appeal on the technical ground of lack of a present controversy -- refusing to decide the applicability of DiBella beyond the bare statement that:

> "Without passing upon the correctness of appellant's premise (That the case was appealable under DiBella) it is enough to say that it does not lead to the suggested conclusion." 344 F. 2d 742, 746.

This same lack of certainty carries over to allied questions. Thus, in United States v. Tane, 329 F.2d 848 (2nd Cir. 1964) the Second Circuit held the rationale of DiBella to be not applicable to a suppression order when the suppression was coupled with a dismissal of the indictment; while in United States v. Kanan, 341 F.2d 509 (9th Cir. 1965) a contrary result was reached and the order of suppression coupled with a dismissal of the indictment was held non-appealable under DiBella.

So too, DiBella was held by the Tenth Circuit not to preclude the appeal of an order granting or denying a motion to quash subpoenas duces tecum issued to non party witnesses when the appeal was on behalf of those witnesses, Covey Oil Co. v. Continental Oil Co., 340 F.2d 992 (10th Cir. 1965) while in In re Grand Jury Investigation, 318 F.2d 533 (2nd Cir. 1963), the Second Circuit held that DiBella did apply to prohibit the appeal of an order granting or denying a motion to quash grand jury subpoenas where the subpoenaed parties were defendants named in another indictment.

From the above it is apparent that interpretations and applications of DiBella are far from uniform and that Courts are often in doubt as to the appealability of criminal related orders. This is particularly true as to the type of order involved in the present case where the order is entered before the criminal machinery has in any conventional sense come into play or is likely to come into play.

DiBella did not involve this type of situation and consequently it is not at all clear whether or not a motion for suppression and return is appealable if the motion is made, argued and ruled upon prior to the institution of any kind of criminal process.

As indicated previously, a motion appealed at this point of time is entirely free from the great defect of the usual criminal motion; i.e., fragmentation of the criminal process which leads to delay in the administration of justice. Rather, in this type of case, it has been observed that a final determination of the constitutional issue at an early stage of the proceedings can have the effect of conserving the judicial machinery, since the admissibility or non-admissibility of important items of evidence are often determinative of whether a criminal action will be brought at all. e.g. U.S. v. Ponder, 238 F.2d 825, 828, 829 (4th Cir. 1956).

In light of the fact that this type of motion has not been the subject of treatment by this Court, the fact that there is much to indicate that the court below seriously misconceived the meaning of DiBella and the fact that other courts have demonstrated an uncertainty as to the applicability of DiBella to cases of this type, petitioner submits that the question presented herein should be decided by this Court.

2. The Constitutional Questions

Should the Court agree that the motion here involved is independent and appealable, petitioner prays that the Court additionally give consideration to the merits of the case since the issues involved therein are of the greatest constitutional importance and are issues which have never been finally resolved by this Court, in spite of great conflict among the lower courts, both state and federal.

A. The Fourth and Fifth Amendment

Petitioner submits that in ruling on the question of waiver of Fourth and Fifth Amendment guarantees, this Court and nearly all lower courts, have been uniform in requiring a showing of full and complete knowledge and uncoerced consent before an alleged waiver of rights will be recognized as a voluntary consent to an otherwise illegal search and seizure. It is petitioner's position that in the isolated area of tax fraud, a number of Courts of Appeal have, whether knowingly or unknowingly, abandoned this principle in favor of a purely mechanical test which, practically speaking, renders the concept of "knowing waiver" a nullity. Such an interpretation is, in petitioner's view, totally improper and entirely out of keeping with the standards announced by this Court on numerous occasions.

The general principles of law applicable to the Fourth and Fifth Amendments are well settled. Thus, it is basic that the rights of citizens to remain inviolate in the security of their "person, houses, papers and effects" shall not be disturbed in the absence of (1) a search warrant; (2) a search incidental to a lawful arrest; or (3) consent which constitutes a waiver of the Fourth Amendment protection. Amos v. United States, 255 U.S. 313 (1921); United States v. Jeffers, 342 U.S. 48 (1951); Villano v. United States, 310 F.2d 680 (10th Cir. 1962); Waldron v. United States, 219 F. 2d 37 (D.C. Cir. 1954).

Equally as well settled is the proposition that when consent is claimed by the State or Federal Government as the vehicle by which an otherwise unlawful search or

seizure is made lawful, the burden or proof is upon the State or Federal Government to affirmatively establish free and voluntary consent, Johnson v. United States, 333 U.S. 10 (1947); Channel v. United States, 286 F.2d 217 (9th Cir. 1960); Cipres v. United States, 343 F.2d 95 (9th Cir. 1965); Higgins v. United States, 209 F.2d 819 (D.C. 1965); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); Villano v. United States, 310 F.2d 680 (10th Cir. 1962).

The cases cited above are representative of most "search and seizure" decisions in that they closely scrutinize any alleged waiver of constitutional right to determine whether it was in fact done knowingly and voluntarily. Curiously, however, when the case involves an Internal Revenue investigation and the consent allegedly obtained is that of a taxpayer, a number of Courts of Appeal have seen fit to turn their backs on the well-settled principles enunciated above and have casually assumed that the taxpayer has waived his rights. The Second Circuit decision of United States v. Sclafani, 265 F.2d 408 (2nd Cir. 1959) cert. denied 360 U.S. 918 (1959) is illustrative. There it was said:

> "... A routine tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the Government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission. ... Moreover, it is unrealistic to suggest that the Government could or should keep a taxpayer advised as to the direction in which its

> necessarily fluctuating investigations lead. The burden on the Government would be impossible to discharge in fact, and would serve no useful purpose." 265 F.2d 408, 414, 415. Accord, Turner v. United States, 222 F. 2d 926 (4th Cir. 1955).

Factually, the Sclafani case involved an investigation much like the one in the present case, beginning with a "routine civil audit" of the taxpayer's books. When the general agent who initiated the investigation began to suspect possible fraud on the part of the taxpayer, a Special Agent was called in, and, without either warning the taxpayer of his constitutional rights or explaining to the taxpayer that a special agent is a criminal investigator, they obtained incriminating information from him. When the taxpayer was subsequently tried on a charge of tax evasion, he testified that he turned over the records to the agents only because he thought that it was a routine civil audit and that had he realized that a criminal investigation was involved, he would not have cooperated with them. The court, notwithstanding this testimony, held that there is implicit in even a routine tax investigation, a warning that it could blossom into a criminal matter and that the taxpayer acted at his peril when he gave information to the agents.

As indicated, Sclafani is not unlike the case at bar factually, and it expressly holds that there is no duty on the part of a special agent to affirmatively warn the taxpayer of his rights. It is petitioner's contention that in so holding, the Second Circuit went absolutely contrary to the philosophy of this Court as enunciated in such cases as Johnson v. United States, 333 U.S. 10 (1947),

Amos v. United States, 255 U.S. 313 (1921), and Johnson v. Zerbst, 304 U.S. 458 (1938), all of which adopt a restrictive view on the matter of waiver.

It is particularly unfortunate that the Second Circuit saw fit to adopt this mechanical approach to the problem of waiver, since the Court had before it a number of earlier cases, mostly in its own Circuit, which had begun to formulate a somewhat more realistic approach toward Internal Revenue searches.

These cases, including Matter of Bodkin, 165 F. Supp. 25 (E.D.N.Y. 1958), United States v. Wheeler, 149 F. Supp. 445 (W.D. Penn. 1957), and United States v. Lipshitz, 132 F. Supp. 519 (E.D. N.Y. 1955) formulated a standard which recognized that affirmative misrepresentation is not the sole ground for a constitutional violation.

In Wheeler, reversed on different grounds at 256 F.2d 745 (3rd Cir. 1959), cert. denied 358 U.S. 873, rehearing denied, 358 U.S. 913, an investigation was made of Wheeler's affairs relative to suspected wrongdoing with Revenue Agents. In order to check on this, Agent Krieger was instructed to conduct a routine tax investigation with the additional secret mission of ascertaining whether Wheeler was, in fact, involved in wrongdoing with Internal Revenue employees. In the course of the "routine investigation", Krieger came upon evidence which indicated the existence of possible tax fraud and he turned this evidence over to his superior to be used in a criminal prosecution for tax evasion. Petitioner then moved to suppress the evidence so obtained on the grounds that his Fourth and Fifth Amendment rights were violated in that he would not have

allowed the agent to examine his records had he been aware of the agent's full mission. In holding for the taxpayer, the Court stated:

> (A failure to warn defendant of his rights) "coupled, however, with the more salient reason of tricking defendant into his releasing his books and records under the guise of a routine tax investigation, when in truth and fact the material was examined with the view of ascertaining evidence of criminal wrongdoing in conjunction with employees of the Internal Revenue Service, poses an issue which strikes at the very core of constitutional immunity ... to secure evidentiary matter without making such disclosure when criminal wrongdoing is suspected consitutes a fraud and deceit upon the taxpayer in violation of his constitutional rights, and his right against self-incrimination." 149 F. Supp. 445, 449, 450.

United States v. Lipshitz, 132 F. Supp 517 (E.D. N.Y. 1955) and United States v. Wolrich as modified, 119 F. Supp. 538 (S.D. N.Y. 1955) both dealt with the so-called "joint investigation", similar to that involved in the present case, wherein a general agent and a special agent work together, the general agent assessing tax liability while the special agent prepares the criminal feature of the case.

In the Lipshitz case, Revenue Agent Obst had been investigating petitioner's books prior to June 30th. On June 30th, 1948, Special Agent Potts was assigned to the case. Potts contacted Agent Obst and told him to

get certain books and records for him, which Obst apparently did, visiting the petitioner's place of business some 19 times between June 20, 1949 and July 26, 1949. The court concluded:

> "I am satisfied that from June 30, 1948, the day Potts was assigned to the case, he together with Obst, were jointly engaged in the preparation of the case for the criminal prosecution of the defendant, and that they did not inform him, nor did he know, that they were so engaged. Potts' assignment of Obst, a Revenue Agent, to obtain, without defendant's knowledge and consent, extensive information and extracts from the taxpayer's books and records, far in excess of those required for the customary routine audit of a Revenue Agent, cannot be appreciably distinguished from the obtainment thereof by stealth or subterfuge. ... It is my opinion, therefore, that the evidence relating to those accounts was obtained in violation of the defendant's rights under the Fourth and Fifth Amendments of the Constitution of the United States." 132 F. Supp. 519, 523.

The Wolrich case, supra, is particularly interesting in that there for the first time a court became cognizant of the inner workings of an Internal Revenue investigation. In Wolrich as originally decided (at 119 F. Supp. 538), the court had found no constitutional violation in the statement of the revenue agent that he was conducting a "routine audit" nor any violation when the agent brought with him a special agent whom he

introduced as a "fellow Revenue Agent." The taxpayer had argued that he would not have allowed the audit had he realized a criminal action might result.

On reargument of the motion (at 129 F. Supp. 528), the court reconsidered its position and agreed to take evidence as to the existence of fraud on the part of the Internal Revenue Service. The Court's change of attitude stemmed from its acquaintance, for the first time, with the Internal Revenue regulations concerning "joint investigations." As the court observed:

> "From this (the Internal Revenue Service Manual) it appears that a Joint Investigation is one that is initiated when probable fraud is indicated. Upon this record, it seems to me that I can no longer, as I have in the past, rest upon the conclusion that the examination was a routine examination." 129 F. Supp. 528, 529.

As indicated above, the Sclafani case and the cases following it, rather than building on the sound foundation laid by the Lipshitz, Wolrich and Wheeler cases, instead went to the other extreme and adopted a purely mechanical view of consent based on the highly questionable assumption that the ordinary taxpayer knows that even a civil audit can result eventually in a criminal prosecution.

It is petitioner's contention that this assumption is factually unwarranted and constitutionally unsound in light of the many decisions of this court requiring that a waiver of rights be made knowledgeably and with understanding. As Johnson v. Zerbst, 304 U.S. 458, 464

(1938) put it:

> "... 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case. ..."

It is petitioner's firm conviction that the reason Judges in tax cases often depart from the sound standard enunciated by this Court, is that the lower courts simply have not been aware of the practical workings of the Internal Revenue investigations. One writer explained the problem of tax investigations in this fashion:

> "A tax investigation has certain aspects which set it apart from the investigation of other crimes. Hence, rules that might well serve to determine whether one accused of committing the ordinary crime has waived his rights cannot be applied blindly and rigidly to tax suspects.
>
> If a police officer or an agent of the Federal Bureau of Investigation interviews a prospective defendant about a burglary or an embezzlement from a national bank, the purpose of the inquiry is clear from the agent's official position, his well-known

duties and the very nature of the interrogation. If the suspect knows his constitutional rights, he either stands on them or waives them.

The visit of a revenue agent, on the other hand, does not present the same clearcut choice. It implies not any suspicion of crime but rather an inquiry into whether the taxpayer owes any additional taxes -- the common, garden variety of tax investigation that winds up either in a finding of no deficiency, payment or litigation on the civil side of the courts.

If the caller should happen to be a special agent rather than a revenue agent, his visit may convey to the tax sophisticate the same implications as the visit of the F. B.I. agent to a kidnapper. But in the absence of some disclosure by the special agent of the purpose of his call the average taxpayer will not be apt to differentiate between the functions of a special agent and of a revenue agent. Particularly will this be true if the special agent leads the taxpayer to believe his only function is to determine whether there is a tax deficiency." Doyle, "Searches and Seizures and the Duty to Warn in Fraud Investigations". N.Y.U. 14th Institute on Federal Tax., 1317, 1326, 1327 (1956).

In light of the above, petitioner prays that this Court consider and finally determine whether the approach

taken by Courts such as Sclafani and Turner is proper under accepted standards of Fourth and Fifth Amendment conduct or whether, as petitioner contends, these cases are totally apart from the mainstream of constitutional thought and do not reflect standards acceptable to this Court.

B. The Sixth Amendment

If any one aspect of the criminal law has assumed paramount importance in recent years, it is unquestionably the Sixth Amendment guarantees of right to counsel. The meaning of this guarantee has been considered by many courts including this Court in such landmark decisions as Massiah v. United States, 377 U.S. 201 (1964) and Escobedo v. Illinois, 378 U.S. 478 (1964).

In the Escobedo case the petitioner had been brought to the police station for questioning in connection with the death of a friend. He was under arrest but had not been indicted, arraigned or otherwise made the subject of a formal prosecution. In the course of the questioning Escobedo asked to see his lawyer and was told that he could see him when the questioning was completed. In the absence of counsel, Escobedo then made certain incriminating statements which were subsequently used against him.

On these facts this Court held that Escobedo's Sixth Amendment right to counsel had been violated and the fact that he was not indicted made no difference so far as his right to counsel was concerned:

> "Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." 378 U.S. 478, 487.

The import of Escobedo is, of course, the time factor -- holding that the right to counsel is guaranteed as early as the pre-indictment stage. So too, this Court in line with the earlier cases of Hamilton v. Alabama, 368 U.S. 52 (1961) and White v. Maryland, 373 U.S 59 (1963), continued the use of the "critical stage" test; holding that the Sixth Amendment requires counsel to be present at that stage of a proceeding most critical to the person's welfare. In Hamilton, that stage was held to be the arraignment and in White, a time even prior to the arraignment (the accused had pleaded at a preliminary hearing).

In the second leading case of Massiah v. United States, supra, this Court clearly enunciated for the first time that the right to counsel and the so-called "critical stage" can include periods when the accused was not under detention, confinement, or even directly confronted by interrogators.

There, this Court held that it was a violation of the person's Sixth Amendment right to counsel when evidence was obtained in the absence of counsel by means of eavesdropping with electronic devices. The petitioner in that case was a seaman who was indicted for violating the federal narcotics laws. He retained a lawyer, pleaded not guilty and was released on bail. While he was out on bail, federal agents convinced a co-conspirator, Colson, to cooperate with the Government and

Colson agreed to let the Government agents wire his car so that the agents could overhear conversations entered into by the occupants of the car. Subsequently, Colson was able to induce Massiah into his car, and in the course of a lengthy conversation, Massiah made several incriminating statements which were introduced at the trial through the testimony of the Government agent who had overheard the conversation. Over objection, the testimony was admitted and petitioner was convicted. A split court affirmed on appeal and on writ of certiorari this Court reversed the conviction stating that:

> "We hold that the petitioner was denied the basic protections of that guarantee (the Sixth Amendment) when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. 201, 206.

In answer to the argument that the petitioner was under no detention or physical coercion when his statements were taken, the dissenting opinion of Judge Hays of the Second Circuit was quoted, saying:

> "If such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." 377 U.S. 201, 206.

The next important step in the right to counsel area was taken by the Supreme Court of California in the now

landmark case of People v. Dorado, 61 A.C. 892 (1964) aff'd on rehearing 62 A.C. 350; cert. denied __ U.S. __, 33 U.S. Law Week 3389 (1965). The Dorado case involved the murder of a San Quentin inmate and the questioning of a fellow inmate, Dorado, concerning the murder. Dorado was interrogated and confessed, neither asking for counsel nor being informed of his right to have counsel. The California Supreme Court, relying expressly on Escobedo, held that the accused's Sixth Amendment right to counsel (as embodied in the Fourteenth Amendment under Gideon v. Wainwright, 372 U.S. 335 (1962))had been violated in that the authorities owed him the duty of warning him of his right not to answer and of his right to counsel. The California court was of the opinion that the requirement of an affirmative warning is a natural outgrowth of the Escobedo decision (which did not discuss the point, since Escobedo had in fact requested counsel) and that the principles embodied in Escobedo could be made effective only if an affirmative warning is required. Thus, Dorado went a step beyond the strict terms of Escobedo and required that an affirmative warning be given to the accused.

Since the opinion in Dorado, a number of state and federal courts have addressed themselves to this highly important question of whether a warning of rights is required to satisfy the Sixth Amendment, and on this subject there is a clear split of authority.

The Supreme Court of Oregon (State v. Neely, 395 P.2d 557 (1964))finding a Fifth Amendment violation, and the Supreme Court of Rhode Island (State v. Dufour, 206 A.2d 82 (1965)) finding a Sixth Amendment breach have sided with Dorado and held that it is necessary that the accused be affirmatively warned of his rights.

Contra and requiring a request on the part of the accused are Delaware (King v. State, ___A.2d ___ (1965), 34 U.S. Law Week 2064). Pennsylvania (Commonwealth ex rel. Linde v. Maroney, 206 A.2d 288 (1965)), (Commonwealth ex rel. Storch v. Maroney, 204 A.2d 263 (1964)), (Commonwealth v. Coyle, 203 A.2d 782(1964)), New York (People v. Gunner, 257 N.Y. Supp. 2d 924 (1965)), Nevada (Dean v. State, 398 P.2d 254 (1965)), and appellate courts in Illinois (People v. Hartgraves, 202 N.E.2d 33 (1964)), Maryland (Sturgis v. State, 201 A.2d 681 (1964)), and New Jersey (State v. Scanlon, 202 A.2d 448 (1964)), as well as the Massachusetts Supreme Court in Commonwealth v. Tracy, 207 N.E.2d 16 (1965).

The federal courts are likewise in complete disagreement with the Third Circuit in Russo v. New Jersey, ___F2d.___ (3rd Cir. 1965), 33 U.S. Law Week 2621; and apparently the Ninth Circuit in Wright v. Dickson, 336 F.2d 876 (9th Cir. 1964) requiring an affirmative warning in order to satisfy the Sixth Amendment while the District of Columbia Circuit in Cephus v. United States, ___F.2d___(D.C. Cir. 1965), 33 U.S. Law Week 2674 and the Seventh Circuit in United States v. Childress, 347 F.2d 48 (7th Cir. 1965), held that a warning is not necessary to satisfy the Sixth Amendment.

Interwoven into the overall problem of Sixth Amendment warning and not severable from it is the specific question of whether the requirement applies to Internal Revenue investigations. It is petitioner's contention that it does. This is pointed to by the fact that White, Hamilton and Escobedo make earlier and earlier that time at which the "critical point" of a criminal proceeding may be reached, extending it back to the pre-indictment stage, while Massiah proclaims that a violation

of the Sixth Amendment may occur outside the confines of a jailhouse interrogation. The interrelation of Massiah and Escobedo was recently recognized by the California District Court of Appeals in a case now pending before the California Supreme Court. That case, Ballard v. Superior Court, 232 ACA 274, hearing granted, 235 ACA, involved a physician who allegedly raped a female patient while she was under the influence of a narcotic or anesthetic. When the woman went to the police, the police arranged for her to make telephone calls to the physician concerning the incident, while the police recorded and monitored the conversations. This was done and at the time of trial the prosecution sought to introduce the recordings into evidence. Counsel for the physician moved to suppress the evidence of the telephone conversations on the ground that they were illegally obtained in violation of the accused's Fifth and Sixth Amendment rights. The motion was denied. The accused then applied to the District Court of Appeals for writs of Mandamus and Prohibition to compel suppression of the evidence.

In ruling on the defendant's application the District Court of Appeals made the following analysis of the right to counsel cases:

> "The People have argued the rule excluding incriminating statements made while the accused stands unadvised of his right to remain silent and right to counsel set forth in People v. Dorado, supra, 62 Cal.2d ___ cannot be applied to this case since custody is an essential prerequisite for its application, and the accused was admittedly not in custody at the time the conversations were recorded. . . .

We do not believe custody is essential to the reason for or application of the rule. (Massiah v. United States, 377 U.S. 201 (84 S. Ct. 1199, 12 L. Ed. 2d 246).) The critical terminations are whether the proceedings have ceased to be a general inquiry into an unsolved crime and begun to focus on the accused and whether the authorities have carried out a process of interrogation that lends itself to eliciting incriminating statements. In Escobedo v. Illinois, 378 U.S. 478 (84 S. Ct. 1758, 12 L. Ed. 2d 977), one of the major premises for the Dorado decision, the court emphasized these two factors in its conclusion as follows: 'We hold only that when the process shifts from investigatory to accusatory--when its focus is on the accused and its purpose is to elicit a confession--our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.' (Id. at p. 492.)"

The court in Ballard continued:

"If our adversary system had begun to operate at the time these conversations were recorded, if petitioner had, for all practical purposes already been charged with rape, his right to counsel matured. In Massiah v. United States, supra, 377 U.S. 201, the other major premise for the Dorado decision, the accused was not in custody at the time the incriminating statements were

> made, but the proceedings had clearly become accusatory since Massiah made the statements after his indictment by a grand jury. Although custody may bear weightily on the issue of whether the accusatory stage is otherwise evident custody is not essential. At the very least Massiah demonstrates the interest being protected is not one which is only deserving of protection when the accused is in custody; i. e. the reason for the rule is not dependent on custody....
>
> But Escobedo indicates that the accusatory or critical stage is not reached unless another event occurs; the police must 'carry out a process' of interrogation that lends itself to eliciting incriminating statements." (Id. at pp. 490-491; see also Id. at pp. 485, 492.) That process may be undertaken either before or after arrest.' This language appears to indicate that while under most circumstances the onset of the accusatory stage is evidenced by an arrest, it may precede the arrest."

The above case is noteworthy in that it indicates that the accusatory process can commence prior to the accused being taken into custody.

Whether the reasoning of the Court in this matter is valid, is a question which the California Supreme Court will soon decide. Further, it is submitted that this question is of equal importance to this Court and that a determination of when the accusatory process

commences can well be made by the Court in the context of the case here presented.

SUMMARY

In light of the importance of the questions involved both procedurally and constitutionally, petitioner respectfully prays that this Court grant certiorari and determine these above questions finally and definitely.

Respectfully submitted,

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For

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Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

T. KIMBALL HILL,

Appellant,

vs.

UNITED STATES OF AMERICA, TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, DISTRICT DIRECTOR OF INTERNAL REVENUE, INTELLIGENCE DIVISION, LLOYD TUCKER, CHIEF INTELLIGENCE DIVISION, CORWIN B. DEVOTIE and EDWIN H. WORDELL,

Appellees.

No. 19,518

[May 6, 1965]

Appeal from the United States District Court
for the Southern District of California
Southern Division

Before: BARNES, DUNIWAY and ELY, Circuit Judges

BARNES, Circuit Judge:

This is an attempted appeal from a district court order which dismissed appellant's temporary restraining order and denied his motion to return and suppress records. The jurisdiction of the district court was invoked under the alternative grounds of 28 U.S.C. § 1346(a)(2) and Rule 41(e), Federal Rules of Criminal Procedure. Appellant alleges that jurisdiction to hear this appeal rests in this court by virtue of 28 U.S.C. § 1291. Appellees contend that this interlocutory order denying a motion to suppress is not an appealable final order of the district court.

This controversy arose from appellees' investigation of appellant's tax returns for the years 1959 to 1962. Taxpayer-appellant is an oral surgeon, practicing dentistry in San Diego, California. Appellant's 1961 tax return was assigned to Internal Revenue Agent, Corwin B. DeVotie, for routine audit and examination. After an initial examination of appellant's tax return, Agent

DeVotie requested a meeting with Dr. Hill at the latter's office. Dr. Hill cooperated fully with Agent DeVotie, and made his office and personal records available for examination.

Following his detailed examination of appellant's records, and after a number of conversations with appellant, Agent DeVotie referred the matter to his superiors for an investigation of possible tax fraud. This initial administrative decision was made by DeVotie after his October 18, 1963 meeting with appellant. As a result of DeVotie's suggestion, Special Agent Edwin H. Wordell was assigned to the case on January 8, 1964.

Wordell was first introduced to appellant on January 22, 1964, when as Special Agent assigned to the case he accompanied Agent DeVotie to appellant's office. There DeVotie introduced Wordell as a Special Agent from the Intelligence Division, and Wordell confirmed this fact to appellant by displaying his commission for appellant's inspection. Wordell explained to appellant that he was assigned to examine appellant's tax returns for the years 1959 through 1962. Appellant assured Wordell that he would continue to cooperate fully.

In the process of his examination, Wordell requested permission from appellant to remove a number of appellant's records and papers to the Internal Revenue Intelligence Division office. Appellant willingly cooperated. On February 26, 1964, appellant, upon request, brought additional documents and records to Wordell's office. It was at this time that appellant was first warned of his constitutional rights—his right to counsel and his right under the Fifth Amendment not to incriminate himself. Appellant nevertheless continued to cooperate fully until March 12, 1964, when he first obtained counsel, and was advised to decline any additional requests for records and documents.

On March 25, 1964, appellant filed a motion for return of seized property and the suppression of evidence and for a temporary restraining order. The temporary restraining order was granted until the court hearing on April 23, 1964. On that date, the district court dismissed the temporary restraining order and denied taxpayer's motion.

The threshold question for our consideration is whether we are possessed of jurisdiction to entertain this appeal. Only if we first

determine that the district court order is appealable can we consider appellant's allegations of constitutional infringements.

At the district court hearing of April 23, 1964, the district court judge, in an effort to resolve the issues before him as expeditiously as possible, suggested that the respective counsel work out some mutually agreeable arrangement for the return of appellant's records. (R. Tr. 42-43.) Pursuant to this suggestion, and with the assistance of the district court judge (R. Tr. 86-87), an arrangement was devised apparently satisfactory to both parties. The court permitted the Assistant United States Attorney to make copies of the documents the government deemed relevant, on the condition that he at all times make the originals available to the inspection of appellant's counsel. At the conclusion of the copying process, the government was required to return the originals to appellant "as soon as possible." (R. Tr. 87.) Counsel for appellant made no objection to this arrangement.

Apparently in view of the accord reached regarding the return of appellant's records, counsel for appellant recognized in his brief that the essential jurisdictional question facing this court is "whether denial of a motion to suppress evidence is an independent appealable order." (O.B. 13.) In his reply brief, however, counsel for appellant stated that only *some* of appellant's records were returned to him, and thus the motion is still one for return, as well as one for suppression of evidence. (R. B. 5.) At oral argument, we inquired of appellant's counsel whether in fact some of appellant's records were still in the government's hands, contrary to the mutual arrangement devised under the supervision of the district court. Appellant's counsel replied, in effect, that he did not know which, if any, records had been withheld by the government.

In light of appellant's apparent acquiescence in the court's plan for return of his records, we do not feel it is proper to consider this appeal as one from an order denying appellant's motion to return records. In particular we are unable to consider appellant's motion one to return records when, at oral argument, appellant failed to offer any statement, charge, or proof that the government had not complied with the court's arrangement for return of records. Certainly the evidence in the record of appellant's acquiescence in the court's plan requires appellant to come forward

with some evidence, or at least assertion, that the government has failed to comply with that plan. Appellant did not do so. His counsel had not inquired of his client whether the evidence had been returned. He had not inquired of his law partners if the evidence had been returned.

In the absence of any evidence that appellant's records and documents have been withheld by the government, we can conceive of but one other ground upon which appellant could possibly argue that this is an appealable motion for return of records, *viz.*, that this is a motion for return of the *copies* of appellant's records. The transcript clearly indicates that the arrangement conceived by the district court required the government to return appellant's records but permitted the government first to make copies of what it deemed relevant. (R. Tr. 87.) We can draw the reasonable inference that the government does in fact have these copies presently in its possession. If appellant objects to these copies, he will have ample opportunity to move for their supression at any criminal proceeding that may be brought against him. (See discussion, *infra.*)

We now turn to the question of whether we can entertain this action as an appeal from an order denying a motion to suppress evidence. Appellant contends that the cases have divided sharply on this question. But, he contends, the judicial trend has been to permit appeals from matters which are *independent* of pending criminal matters and hence not dilatory in nature. As supportive of this argument, appellant offers two circuit court opinions and one Supreme Court opinion. In *Perlman v. United States,* 247 U.S. 7 (1918), certain exhibits belonging to the petitioner were in the custody of the federal district court. These exhibits had been submitted in a civil suit brought by Perlman which since had been discontinued. The discontinuance was granted, however, on the condition that the exhibits remain in the custody of the court for the use of the United States as part of a criminal action against Perlman. Perlman moved to enjoin the United States Attorney from taking possession of the exhibits and the motion was denied. The United States Supreme Court held Perlman's motion appealable as an independent suit in equity.

In re Brenner, 6 F.2d 425 (2d Cir. 1925) and *United States v. Ponder,* 238 F.2d 825 (4th Cir. 1954), also involved independent

actions for the return of property. In *Brenner*, for example, petitioner had had a conviction for violation of the Prohibition Act reversed on appeal. He then moved the court for the return of his liquor supply which had been seized at the time of his arrest. The motion was denied, but the second circuit entertained his appeal and ultimately reversed the district court.

As noted above, unlike the cases relied upon by appellant, the present case no longer is an appeal from an order denying a return of records. Appellant's attempt to appeal is rather from a denial of his motion to suppress evidence in any criminal prosecution which may be initiated in the future. Admittedly, this motion does not involve a dilatory tactic which interferes with the expeditious resolution of a pending criminal matter; and in that respect it is not objectionable to entertain this appeal. Appellant relies upon the Supreme Court decision in *DiBella v. United States*, 369 U.S. 121 (1962), to support his assertion of the appealability of an order where it is not attendant to a criminal case *in esse*. But the Court in *DiBella* said:

> "Only if a motion is solely for the return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." *Id.* at 131-32.

As pointed out by appellees in their brief (p. 12), "*DiBella* requires *both* a request for return of property *and* independence from the criminal case before the order denying return becomes appealable."

All that remains on this attempted appeal is the district court's order denying appellant's motion to suppress evidence. Since this attempt to suppress evidence has developed before any action has even been commenced, and, for that matter, has developed where an action may never even be commenced, we find this motion is nothing more than a premature request. If a criminal prosecution does subsequently take place, appellant can raise a motion to suppress any evidence which the government may have secured in violation of his constitutional rights.

The appeal from the district court order is dismissed.

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In The Supreme Court of The United States

T. KIMBALL HILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
DISTRICT DIRECTOR OF INTERNAL REVENUE,
INTELLIGENCE DIVISION,
SAN DIEGO COUNTY OFFICE,
LLOYD TUCKER, CHIEF INTELLIGENCE DIVISION,
CORWIN B. DeVOTIE, and EDWIN H. WORDELL,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

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No. 621

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

T. KIMBALL HILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
DISTRICT DIRECTOR OF INTERNAL REVENUE,
INTELLIGENCE DIVISION,
SAN DIEGO COUNTY OFFICE,
LLOYD TUCKER, CHIEF INTELLIGENCE DIVISION,
CORWIN B. DeVOTIE, and EDWIN H. WORDELL,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

INTRODUCTORY STATEMENT

Pursuant to Supreme Court of the United States Revised Rules, Rule 24 (4), Petitioner hereby submits supplemental authorities for consideration as part of T. Kimball Hill's Petition for Certiorari filed with this Court on September 27, 1965.

REASONS FOR GRANTING THE WRIT

2. The Constitutional Questions

B. The Sixth Amendment

In Dr. Hill's Petition for Certiorari it was contended that the principles enunciated in Escobedo v. Illinois, 378 U. S. 478 (1964), and Massiah v. United States, 377 U. S. 201 (1964) properly apply to tax fraud investigations. It was petitioner's belief that as such, a failure on the part of a Special Agent of the Internal Revenue Service to warn a taxpayer of his constitutional rights at the time a criminal investigation is undertaken constitutes a violation of the taxpayer's Sixth Amendment right to counsel.

However, due to the recentness of the Escobedo and Massiah decisions there were, to the petitioner's knowledge, no cases which had at that time considered this theory and applied it to the tax fraud area.

Coincidentally, however, the same day Dr. Hill's Petition for Certiorari was filed herein, a case was decided by the United States District Court for the District of Arizona which applied the Escobedo - Massiah rationale to a tax fraud situation not dissimilar to the one at bar.

In that case, United States v. Schoenburg, U. S. District Court, Phoenix No. C-16922, books and records belonging to Schoenburg were obtained from the taxpayer's accountant (with the taxpayer's ostensible permission) by a Special Agent (Corrigan) who had been introduced as "working with" the general agent (Leenerts).

Later, in a formal interview held at Internal Revenue offices, the same two agents succeeded in obtaining certain damaging statements from the taxpayer. Neither at the time of the interview nor at the time the records were obtained was the taxpayer or his accountant warned of the taxpayer's constitutional rights nor warned of the fact that a criminal investigation was underway.

The affidavit of Special Agent Corrigan indicates that no warning of any kind was given to Schoenburg and that in the agent's own words, he was introduced only by the statement, "This is Ryan Corrigan. He is working with me." It was the testimony of Schoenburg and his accountant that they turned over the records on the belief that the matter involved was a commonplace civil audit and that neither was aware of the criminal aspects of the investigation. In point of time, the taxpayer did not have counsel either when he turned over the records or when he was formally interrogated at the Internal Revenue offices.

Testimony also indicates that when the taxpayer did finally obtain counsel, the attorney arranged to see the transcript of the taxpayer's oral statement, only to have the statement snatched away when counsel attempted to make notes. In addition, later that same day, Special Agent Corrigan and General Agent Leenerts attempted to obtain additional books and records from the office of the taxpayer's accountant at a time when the accountant was out of his office. The employees of the accountant resisted this attempt in spite of coercive conduct on the part of the agents.

The legality of the agents' conduct relative to the taking of the taxpayer's oral statement and the seizure of his records was questioned on two separate occasions. Initially, there was a motion made to suppress the records and the oral statement as evidence as well as to quash the indictment. This motion was made and argued before Judge William C. Mathes and was grounded in the contention that the taxpayer's Fourth and Fifth Amendment rights had been violated. Based on what the court conceived to be the applicable law, Judge Mathes denied Schoenburg's motion and found no constitutional violation. This motion, however, was filed prior to the reporting of this Court's decision in Escobedo v. Illinois.

Following the publication of this landmark decision, a second motion was made by the taxpayer calling for the suppression of both the taxpayer's oral statement and his books and records on the ground that they were taken in violation of his Sixth Amendment right to counsel. Briefs were filed in support of the motion and in opposition to it with both briefs directed to the applicability of the Escobedo and Massiah decisions to tax fraud cases.

After hearing oral argument, the Court, in the person of District Judge Walter Craig, ordered the suppression as evidence of the taxpayer's oral statement. In granting a part of Schoenburg's suppression motion, the Court did not render an opinion and no reporter was present to record the argument.

Notwithstanding the absence of a formal opinion, the case does indicate at the very least that the philosophy of Escobedo and Massiah has been argued as being

applicable in the tax fraud area and that courts can be found apparently approving this application. As such, it is petitioner's belief that Schoenburg is just one of many cases which will soon pass on the applicability of Escobedo and Massiah to tax fraud cases and in so doing, necessarily determine whether Escobedo and Massiah require that an affirmative warning be given to the taxpayer.

Concerning the problem of "affirmative warnings" generally, it should be noted that Pennsylvania, one of the jurisdictions which formerly held that the Sixth Amendment does not require that the accused be affirmatively warned of his rights, has recently reversed its position in the case of Commonwealth v. Negri, ____A2d ___, 34 U. S. Law Week 2186 (Sept. 29, 1965). In so doing the Pennsylvania Court adopted the rule of the United States Court of Appeals for the Third Circuit as enunciated in Russo v. New Jersey, 33 U. S. Law Week 2621 (1965) - - requiring that an affirmative warning be given to the accused. In altering its position to conform to that of the Third Circuit, the Pennsylvania Supreme Court pointed out that it would be an unhealthy situation to have the Pennsylvania state courts adhering to one standard in this vitally important area while the federal courts across the street apply a different standard. As the court put it:

> "In order to alleviate and correct a regrettable situation, the clear indication for this court is to accept and follow the decision of the Third Circuit on this matter until some further word is spoken by the Supreme Court of the United States."

In light of the unquestioned constitutional importance of the "affirmative warning" doctrine, the dissension and confusion in the field, as well as the tremendous impact that the affirmation or denial of this doctrine will have on the criminal tax law, petitioner submits that the problem of "affirmative warnings" is ripe for determination by this Court and that the case at bar is an appropriate vehicle for making this determination.

Respectfully submitted,

/s/ JAMES O. HEWITT

For

HEWITT, KLITGAARD and McMAHON

Attorneys for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 621

T. KIMBALL HILL, PETITIONER

v.

UNITED STATES ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

During 1963, T. Kimball Hill, the petitioner, met several times with a Revenue Agent to discuss his income tax returns for 1961 and 1962. At a meeting on October 18, 1963, the Revenue Agent mentioned to the petitioner that substantial dividends first appeared in his 1962 return and asked where he had obtained the funds to acquire the stock. The petitioner stated in effect that he was glad that this was in the open and that he had had trembling hands ever

since the investigation began. After that meeting, the Revenue Agent referred the case to his superiors, suggesting that there might be fraud. (R. 38-39.)[1]

In January, 1964, a Special Agent of the Internal Revenue Service met with the petitioner and displayed his commission. The petitioner expressed a desire to cooperate fully and gave business records to the Special Agent. On February 26, 1964, the petitioner attended a question-and-answer conference in the District Director's office in San Diego where he was advised of his rights under the Fourth, Fifth and Sixth Amendments. Subsequently the petitioner continued to cooperate and turned over additional business records to the Internal Revenue Service. On February 28, the petitioner admitted that he kept two sets of books and that the second set was transcribed to agree with the figures shown in his tax returns. (R. 39-41.)

On March 25, 1964, the petitioner sought a restraining order and filed a motion for return of property and for its suppression as evidence against him in any criminal proceeding. (R. 2.) The district court granted a temporary restraining order but, after a hearing, dismissed the order and denied petitioner's motion. (R. 17, 32, 44.) The petitioner, an oral surgeon, alleged a need for the business records —particularly the patient record cards—in his office. (R. 13-14; Tr. 22-23.)[2] At the suggestion of the dis-

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[1] "R" references are to Volume I of the Transcript of the Record below.

[2] "Tr." references are to Volume II of the Transcript of the Record below.

trict court and in order to prevent the disruption of petitioner's practice, the government copied petitioner's records and returned to him the originals, except for the altered patient record books[3] which were open to inspection by the petitioner at any time. (Tr. 42-43, 86-87.)

On appeal, the court of appeals noted the district court's arrangement for the return of petitioner's business records and the failure of the petitioner to show that the government had not complied with that arrangement. It found that the appeal was solely from the order denying the motion to suppress evidence (Pet. 39-40.) and ruled that such an order was not appealable (Pet. 41).

The question presented here is whether an order denying a motion designed to suppress the use of evidence in a future criminal proceeding is appealable in advance of indictment. Whether an order is independent and appealable is determined by a pragmatic test. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306; *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546; *Cogen* v. *United States*, 278 U.S. 221, 225. With the arrangement of the district court for the return of petitioner's business records, his need for those records was satisfied and there was no compelling need for an immediate appellate determination.

Since *DiBella* v. *United States*, 369 U.S. 121, it has been settled that an order granting or denying

[3] The information contained in the record books appears to have been taken from the cards (R. 61-62, 65-66) which were returned.

a motion which aims principally at the suppression of evidence is not appealable even if the appeal is taken before the return of an indictment. On the authority of *DiBella*, this Court granted certiorari in three cases which had allowed such appeals and, in each case, vacated the decision and remanded with instructions to dismiss the appeal. *Murphy* v. *United States*, 369 U.S. 402; *Grant* v. *United States*, 369 U.S. 401; *Greene* v. *United States*, 369 U.S. 403.[4] As stated in *DiBella* (pp. 131-132):

> Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent.

As the court of appeals held in the instant case (Pet. 41), the fact that the motion is anticipatory does not obscure its purpose or make the order appealable.

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[4] The petitioner does not cite these cases. Instead, he purports to rely on cases decided before *DiBella*, *supra*, none of which involves the type of appeal attempted in this case. Of those cases he cites that were decided after *DiBella*, only one —*Lord* v. *Kelley*, 223 F. Supp. 684 (D. Mass.)—is applicable. In that case, Judge Wyzanski said of a pre-indictment motion to suppress and return that (p. 688) "the adjudication of the trial court is immunized from appellate review." On appeal, the court of appeals dismissed for lack of jurisdiction. 334 F. 2d 742 (C.A. 1). This Court denied certiorari. 379 U. S. 961.

The decision below is correct. There is no conflict among the circuits and no occasion for review by this Court.

Respectfully submitted,

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NOVEMBER 1965.

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Respondents.

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 621

T. KIMBALL HILL,

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CORWIN B. DeVOTIE, and EDWIN H. WORDELL,

Respondents.

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI

On December 13, 1965, this Court entered its order denying petitioner's application for a writ of certiorari to the United States Court of Appeals for the

Ninth Circuit. Petitioner, under the terms of Supreme Court Revised Rule 58 (2), herein moves that the Court reconsider its order of December 13 and grant the aforesaid petition for certiorari.

This petition for rehearing is grounded in the fact that certain recent cases have come to light which demonstrate clearly the existence of a conflict among the circuits on the issue of appealability as well as over the application of Escobedo v. Illinois, 378 U. S. 478 (1964) to the tax fraud area.

ISSUES

I

Whether a District Court's denial of a motion to suppress and return records and other data is a final, appealable judgment when the motion has been made, argued and ruled upon prior to, and in the absence of criminal proceedings being instituted against the petitioner.

It was pointed out in T. Kimball Hill's petition for writ of certiorari (p. 13) that there was little definitive authority on the applicability of DiBella v. United States, 369 U. S. 121 (1962) to the tax fraud investigation. It was also suggested that what available authorities there were, tended to be either inconclusive or inapplicable to the fraud situation. Consequently, it was petitioner's position that this, coupled with the great practical importance of the appealability problem in the day-to-day administration of the criminal law, warranted the granting of a writ of certiorari by this

Court. At that time, however, petitioner could not point to a direct conflict among the circuits on the appealability issue. Such a conflict does now exist.

It was, and is, fundamental to petitioner's argument that the basic holding of DiBella revolves around independence of the motion from a going criminal proceeding and that an element of suppression does not in and of itself negate appealability.

It was noted in the petition for writ of certiorari that it is not uncommon in the criminal tax field for the entire course of a prosecution--indeed often whether there will be a prosecution at all--to hinge on the legality and admissibility of oral and documentary evidence obtained from the taxpayer far in advance of trial; evidence obtained by conduct whose constitutionality can be finally adjudicated long before any conventional criminal process is invoked against the taxpayer. It is this almost unique independence from pending criminal matters which prompted the Ninth Circuit to hold below that:

> "Admittedly, this motion does not involve a dilatory tactic which interferes with the expeditious resolution of a pending criminal matter; and in that respect it is not objectionable to entertain this appeal." 346 F.2d 175, 178 (9th Cir. 1965)

Yet, notwithstanding this finding the Ninth Circuit went on to hold that:

> "As pointed out by appellees in their brief (p. 12), 'DiBella requires both

> a request for return of property and independence from the criminal case before the order denying return becomes appealable.'" Ibid.

Then, almost simultaneously with the rendering of the Ninth Circuit's decision in Hill, the United States Court of Appeals for the Tenth Circuit in the case of Gottone v. United States, 345 F.2d 165 (10th Cir. 1965), cert. denied 34 U.S.L.W. 3158, on facts similar to Hill, handed down a decision totally at odds to that of the Ninth Circuit. The Gottone case involved a seizure by Internal Revenue Agents of various papers and other documentary evidence from the home and automobile of the appellant. Substantively, the point at issue was whether the seizure was within the scope of the warrant held by the agents. The District Court held that it was and on appeal the Tenth Circuit affirmed.

The more significant holding, however, relates to the issue of appealability wherein the Tenth Circuit stated:

> "This is an independent proceeding filed by motion under Rule 41(e), Fed. R. Crim. P., wherein the appellant-movant sought to suppress and have returned to him certain papers and materials taken from his person, automobile and home by agents of the United States. Appellant is not under arrest nor is an information or indictment outstanding against him. Since the motion is not made in nor dependent upon

> a case in esse, the District Court's denial of such motion is an appealable order, Go-Bart Importing Co. v. United States, 282 U. S. 344, 356, 51 S. Ct. 153, 75 L. Ed. 374 and within the exception set forth in DiBella v. United States, 369 U. S. 121, 131-132, 82 S. Ct. 654, 7 L. Ed. 2d 614."

It should be noted that in Gottone, as in Hill, the initial motion to suppress and return was made under the terms of Federal Rule of Criminal Procedure 41 (e). In both cases suppression as well as return was sought and in each case the motion was made prior to the institution of any formal criminal process against the taxpayer. Yet, on these identical facts the Tenth Circuit held that the denial of the motion to suppress was independent and appealable while the Ninth Circuit ruled directly to the contrary, deeming the denial of relief to be nonappealable -- totally irreconcilable holdings.

In light of the diametrically opposed positions adopted by these two adjoining circuits, as well as the very practical consideration that the appealability or nonappealability of suppression orders is the pivot on which the entire course of innumerable tax fraud prosecutions rest, it is submitted that the Court should grant certiorari on this issue.

II

Whether the obtaining of information, including records, from an individual taxpayer by Internal Revenue Agents constitutes a deprivation of the taxpayer's rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution when at no time prior to obtaining such records and information was the taxpayer advised of his constitutional rights or notified that the investigation had changed in nature from civil to criminal.

Just as recent decisions have pointed up a conflict among the circuits over the problem of appealability, so too, a disagreement among the courts appears to be rapidly developing on the matter of this Court's decision in Escobedo v. Illinois, 378 U. S. 478 (1964) as it applies to tax fraud prosecutions.

As was pointed out in the petition for writ of certiorari, the clearest kind of disagreement exists in both the federal and state courts on the question of whether the constitutional right to counsel requires that an accused be affirmatively warned of his rights as well as on the question of when precisely the "accusatory stage" is reached. At the time of filing the petition for certiorari, there were not, to petitioner's knowledge, any cases which had considered these problems in the context of a tax fraud prosecution.

Shortly thereafter, an unreported District Court decision was handed down by the United States District Court for the District of Arizona which did appear to consider the above problems although no formal opinion

was rendered by the court. This case, United States v. Schoenburg, U. S. Dist. Court, Phoenix No. C-16922 was brought to this Court's attention in petitioner's supplemental brief at pages 2-5.

Since that time, two additional decisions have come to light which, when contrasted, point to a wide diversity of opinion with respect to the meaning and applicability of Escobedo in the context of a tax fraud prosecution.

In the first, Kohatsu v. United States, 65-2 U.S. T.C. ¶9715 (9th Cir., 1965), the Ninth Circuit was confronted with a situation which on its facts bears a striking resemblance to the case at bar. In Kohatsu, as in the present case, the defendant was a taxpayer who had been subjected to a fraud investigation during the course of which he gave over books and records to the Special Agent. Likewise, the taxpayer made certain statements of an arguably incriminating nature at a formal interview conducted at Internal Revenue Service offices. A warning of constitutional rights was given at the time of the interview with no previous warnings having been tendered beyond the initial identification of the Special Agent by name and job title. On these facts, the Ninth Circuit held that Escobedo was not applicable to the tax fraud investigation since Escobedo involved the case of a definitely existing, though yet unsolved crime, whereas in the tax fraud situation the investigation was preliminary only and had not yet "focused" on the taxpayer as a criminal "accused."

Contrasted to this is the approach of the United

States District Court for the Middle District of Pennsylvania in United States v. Gower, 65-2 U.S.T.C. ¶ 15,655 (M.D. Pa. 1965). In Gower, as in both Hill and Kohatsu, a motion to suppress evidence of records turned over to the Special Agent and of an oral statement given at Internal Revenue Service offices was made by the petitioner under Rule 41 (e) of the Federal Rules of Criminal Procedure. In Gower, the suppression motion was made in conjunction with a motion for the production of documents. On hearing of the motions, it became apparent that there was a substantial conflict of evidence on the question of whether the taxpayer had been warned of his constitutional rights and if so, to what extent. In light of this the court ordered an in camera inspection of the subpoenaed materials to be followed later by an argument on the motion to suppress. The argument of the suppression motion was then set for hearing, continued once and then continued again for an indefinite period. As of this date the motion has not yet been finally determined. The case is important, however, because the court did hold that the accusatory stage might have been reached at the time the Special Agent entered the case and, if it was, that the taxpayer had a right to be warned of his constitutional rights at that time. In the words of the court:

> "The factual issues to be resolved at the hearing on the Motion to Suppress are (a) when did the investigation move from the routine civil investigatory stage to the accusatory stage where a criminal prosecution against defendant was contemplated, and (b) did the agents obtain evidence from defendant by

> deceptive and fraudulent means, specifically, by attempting to procure evidence for a criminal prosecution under the guise of conducting a routine civil examination?
>
> It would appear that the material sought by defendant from the Government would shed light on these issues and, if inspected in advance, would unquestionably expedite the hearing. If the investigation had moved to the accusatory stage where criminal prosecution was contemplated and evidence in support thereof was being prepared, then defendant should have been properly and adequately advised of his Constitutional rights. If evidence was obtained from defendant by fraud and deceit, then it should be suppressed." (Emphasis added.)

From the above, it is apparent that the Court writing in Gower approached the tax fraud investigation from the standpoint of two definitely ascertainable stages -- the routine civil investigation and the criminal "accusatory" investigation. Further, in line with the decision of the Third Circuit in Russo v. New Jersey, 351 F. 2d 429 (3rd Cir., 1965) the Gower court leaves no doubt that if the accusatory stage had been reached at the time of the fraud investigation, that the taxpayer had a right to be warned of his constitutional guarantees at that time.

A comparison of this reasoning to that of Kohatsu makes it clear that entirely different approaches have

been used. In Kohatsu the court holds that the investigation has not "focused" within the meaning of Escobedo at the time of the Special Agent's entry into the case for the reason that the inquiry at that time is still basically one of ascertaining whether a crime has been committed as opposed to narrowing down the list of suspects.

What the Ninth Circuit does not seem to recognize is the fact that in tax prosecutions there is only one prime suspect - the taxpayer; and, if the crime of tax fraud has been committed, it is almost of necessity the taxpayer who committed it. Thus, the tax investigation by its nature centers, not on who committed the crime, but rather on whether the crime has in fact been committed at all.

Consequently, to hold, as the Ninth Circuit does, that the investigation has not "focused" on the accused because proof of the crime is still the key issue, is to ignore the realities of the tax investigation. It was recognition of the very fact that a tax investigation does follow a different format than the typical criminal investigation which prompted the Gower court to observe that a warning of rights would be required at the time the Special Agent entered the case if at that time the "criminal prosecution was contemplated and evidence in support thereof was being prepared."

Since the very entry of a Special Agent into a case presupposes at least a potential criminal prosecution, it is clear that the two cases are totally at odds in their viewpoints with one (Gower) recognizing the distinct likelihood of the accusatory stage having been reached while the other (Kohatsu) holds that the accusatory stage

has definitely not been reached.

CONCLUSION

It is submitted, in light of these newly decided cases, that this Court's order denying certiorari should be reconsidered and a writ of certiorari ordered to issue for the purpose of reviewing both the issue of appealability and the constitutional issue presented under Escobedo.

Respectfully submitted,

JAMES O. HEWITT

For

HEWITT, KLITGAARD and McMAHON

Attorneys for Petitioner

Pursuant to Rule 58 (2) I hereby certify that the above petition for rehearing is presented in good faith and not for purposes of delay. I further certify that the contents of said petition are confined to intervening circumstances of substantial or controlling effect, or to other substantial grounds available to petitioner although not previously presented.

JAMES O. HEWITT